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No. 05-85

IN THE

Supreme Court of the United States

POWEREX CORP.,
Petitioner,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Rule 29.6 Statement was set forth at page vii of its opening brief, and there are no amendments to that Statement.

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Under the multi-factor approach adopted by every court of appeals except the Ninth Circuit, Powerex Corp. is an "organ" of British Columbia within the meaning of the Foreign Sovereign Immunities Act of 1976 ("FSIA"). Instead of defending the Ninth Circuit's rigid three-part test, respondents offer their own restrictive two-part test, which no court has adopted. The Court should reverse and hold that an entity is an organ when, considering all relevant factors, it serves a public purpose and that Powerex meets that standard.

Respondents devote the bulk of their brief to advancing a novel approach to subject-matter jurisdiction under the federal-officer and FSIA removal statutes that lacks support in this Court's cases. Under well-settled precedent, the district court had subject-matter jurisdiction upon the proper removal of the case under 28 U.S.C. §§ 1441(d) and 1442. The court did not lose that jurisdiction when it concluded that the Bonneville Power Administration ("BPA"), Western Area Power Administration ("WAPA"), and BC Hydro were entitled to immunity. Accordingly, the district court did not remand the case for lack of subject-matter jurisdiction under 28 U.S.C. § 1447(c), and 28 U.S.C. § 1447(d) therefore does not apply.

ARGUMENT

I. POWEREX IS AN "ORGAN" UNDER THE FSIA

Under the proper, fact-sensitive analysis, Powerex is an organ of British Columbia – a conclusion that the British Columbia and Canadian governments have endorsed in briefs that respondents admit (at 49) are relevant here. *See* Pet. Br. 20-32; U.S. Br. 20-25; B.C. Br. 11-21; Canada Br. 4. Respondents purport to agree that courts should employ a multi-factor, fact-sensitive analysis to evaluate FSIA organ status and that "[n]ot every factor will be present in every case." Resp. Br. 35-36. But they disregard the factors that courts universally apply and, instead, treat as dispositive two criteria – whether the entity performs a "characteristically" governmental function and whether it is subject to active government supervision.

Id. at 35-39. That test finds no support in the FSIA's text, structure, purposes, or history.

A. Respondents' Two-Part Test For Organ Status Conflicts With The FSIA

1. Although respondents do not specify what is a "governmental function" that satisfies the first part of their test, they apparently concede that Powerex engages in "a characteristic function of government" – "exploitation of a country's natural resources." Resp. Br. 39. They assert, however, that an entity's function is no longer "governmental" when the entity performs the function for profit.

But whether an entity seeks profits cannot be dispositive of its organ status. The FSIA's text, structure, and history demonstrate that Congress intended the term "organ" to include commercial entities. *See* Pet. Br. 20-22. Commercial entities, by their nature, seek to take in more money than they spend. *See, e.g.*, 49 U.S.C. § 24301(a)(2) ("Amtrak . . . shall be operated and managed *as a for-profit corporation*") (emphasis added).

The relevant question therefore is not whether an entity generates profits; it is whether those profits benefit *the public*. *See* Pet. Br. 21-22, 35. On that issue, to the extent that Powerex's income exceeds its costs, the *only* beneficiaries are the Province (Powerex's sole owner through its statutory agent, BC Hydro) and the Province's ratepayers. *See id.* at 26-28; U.S. Br. 25; B.C. Br. 18-20. In this way, Powerex is no different from BPA, which markets power and uses "[m]oney generated from surplus [power] sales [to] keep power rates . . . low,"[1] and it is even more governmental than the second Bank of the United States, which had "shareholders other than the United States." *Lebron v. National R.R. Passenger Corp.*,

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[1] *See* BPA, *Who Are We?*, http://www.bpa.gov/corporate/About_BPA/. That belies respondents' claim (at 50) that BPA is "quite different" from Powerex. Both entities were created by their governments to market locally generated power for public benefit.

513 U.S. 374, 387 (1995); *see* Ralph C.H. Catterall, *The Second Bank of the United States* 22 (1903).[2]

Respondents' active-supervision requirement similarly conflicts with the Act's text. To be an organ, an entity must be a "separate legal person" and thus have some level of independence from the government that created it. 28 U.S.C. § 1603(b)(1). Requiring "active" supervision would defeat many of the benefits that governments gain by incorporating separate legal entities to conduct commercial functions for public benefit. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 624-25 (1983) ("distinctive features" of instrumentalities permit them "a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies"). Because organ status is a contextual inquiry that turns on no single factor, it makes far more sense to evaluate "the degree of supervision by the government," *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir. 2003), rather than simply labeling the supervision "active" or "passive."

2. Respondents' only attempt to ground their proposed test in the FSIA's text is to claim (at 36) that, because this Court has held that governmental control is not relevant under the "ownership" prong of § 1603(b)(2), *see Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003), governmental function and control therefore must be relevant under the "organ" prong. That is a non sequitur. In recognizing that "[c]ontrol and ownership . . . are distinct concepts," *id.*, this Court did not purport to address the meaning of the FSIA's organ prong.

Respondents' principal support for their test comes from snippets of cases from other contexts and a dictionary definition. *See* Resp. Br. 34 & n.22. But each of those

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[2] *Board of Regents v. Nippon Telephone & Telegraph Corp.*, 478 F.3d 274 (5th Cir. 2007), did not hold (as respondents suggest (at 40)) that an entity can be denied organ status despite having no private shareholders; a majority of that entity's shareholders were private. *See id.* at 279.

sources apparently refers to an "organ" as a part of the sovereign itself. *See Pasquantino v. United States*, 544 U.S. 349, 369 (2005) (President of the United States); *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 261 (1951) (Frankfurter, J., dissenting) (courts); *Webster's Third New Int'l Dictionary* 1589 (2002) ("a governmental instrumentality operating as a part of a larger organization" – *e.g.*, "the cabinet's function as a general [organ] of government"); *see also Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) ("organ[] of state government" created to reapportion legislative districts). That cannot be the meaning of "organ" Congress intended in the FSIA because, to be an organ, an entity must be a "legal person" that is "separate" from the foreign state itself. 28 U.S.C. § 1603(b)(1). *Cf. Booth v. Churner*, 532 U.S. 731, 737-39 (2001) (looking to "broader statutory context" and "statutory history" rather than dictionary definitions urged by the parties).

In searching for support in the FSIA's purposes, respondents allude (at 37) to Congress's desire to provide fairness to plaintiffs by rationalizing the process for determining foreign entities' entitlement to immunity from suit. *See* H.R. Rep. No. 94-1487, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605; S. Rep. No. 94-1310, at 6 (1976). But they offer no support for the claim that Congress wanted suits against sovereigns brought in state courts.[3] To the contrary, as a trade-off for giving plaintiffs the ability to sue foreign states, Congress expressly granted foreign states their choice of forum, *see Ruggiero v. Compania Peruana de Vapores*, 639 F.2d 872, 878 (2d Cir. 1981) (Friendly, J.), and expressed a strong preference for having cases involving foreign states heard in

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[3] Respondents are mistaken in claiming (at 38) that they could be deprived of a jury trial by foreign sovereigns they did not even sue. Respondents' claims against Reliant and Duke could have been tried to a jury. *See In re Air Crash Disaster*, 96 F.3d 932, 943 (7th Cir. 1996).

federal court, *see Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983).[4]

3. No court of appeals decision on which respondents rely (at 35) supports their restrictive two-factor test. Rather, in each one, the court evaluated at least five factors, none of them dispositive. *See Nippon*, 478 F.3d at 279-80; *Peninsula Asset Mgmt. (Cayman) v. Hankook Tire Co.*, 476 F.3d 140, 143 (2d Cir. 2007); *USX*, 345 F.3d at 209-13. Those courts did not require that the entity "perform a function that the government typically would undertake itself," as respondents claim (at 35); rather, they considered "whether the foreign state created the entity for a national purpose." *Nippon*, 478 F.3d at 279; *accord Peninsula*, 476 F.3d at 143; *USX*, 345 F.3d at 209. Powerex readily meets that standard. *See* Pet. Br. 25-26.[5] To be sure, courts consider "government supervision of the entity," *id.* at 24, and some have used the label "active" (though not in the way respondents do), but other courts have not, *see USX*, 345 F.3d at 209; *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 640 (9th Cir. 2003), and there is no basis in the FSIA to employ it.

B. The Record Evidence Requires Reversal

Respondents' analysis of the record evidence fares no better than their proposed test for organ status.

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[4] Moreover, any fairness inquiry here surely weighs in Powerex's favor, as the Federal Energy Regulatory Commission has found no merit in allegations of wrongdoing by Powerex during California's "energy crisis." *See* Joint Explanatory Statement at 3, *Powerex Corp.*, Docket Nos. EL03-166-000 & EL03-199-000 (FERC filed Oct. 31, 2003) (finding "no probative evidence that Powerex engaged in or facilitated any" prohibited trading practices and concluding that "Powerex was a valuable and reliable supplier of energy and ancillary services to the California organized markets throughout the period"), *available at* http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=9933358.

[5] While some of the decisions on which respondents rely concluded that the foreign entity performed "traditional government functions," that was sufficient – but not necessary – to demonstrate that the entity was created "for a national purpose." *Peninsula*, 476 F.3d at 143.

1. Respondents erroneously assert (at 9, 33) that the Court should not resolve the question on which it granted certiorari because the lower courts made "factual" findings that Powerex is not an organ of British Columbia. But the historical facts of this case are reflected in the record and the lower courts' opinions, and they are undisputed. Powerex challenges the lower courts' misinterpretation of the FSIA and their misapplication of the Act to those facts – issues on which this Court owes no deference to the lower courts. *See Ornelas v. United States*, 517 U.S. 690, 697-98 (1996) (applying *de novo* review to "control" and "clarify" legal standard that, like organ status, cannot be articulated with precision, but "acquire[s] content only through application"); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995) (questions of law reviewed *de novo*); *see also* Pet. Br. 25 n.24 (citing FSIA cases in which this Court has independently applied the law to the facts of the case).

2. Respondents contend (at 38-41) that Powerex does not perform a public activity because it engages in energy trading. But Powerex's participation in wholesale electricity markets within the United States allows the Province to maximize the value of its hydroelectric resources by exporting energy when available and, when necessary, importing energy to replace depleted Provincial resources. *See* Pet. App. 58a (Peterson Decl.); JA 235-37, 238-39 (Peterson Dep.). Indeed, respondents concede (at 39) that, in maximizing the value of the Province's natural resources, Powerex serves a public purpose. *See* Pet. App. 16a.[6]

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[6] In seeking to minimize the concededly public nature of that activity, respondents note (at 40 n.25) that, if Powerex did not exist, BC Hydro would not take over the function of selling power in the United States. *See* Pet. App. 24a, 59a-60a; JA 237-38 (Peterson Dep.). If Powerex did not exist, British Columbia power would be sold at the border in a less profitable manner. JA 236 (Peterson Dep.). But Powerex *does exist*; the Province ordered its creation; and it has been performing the public function of exporting provincially generated hydropower for nearly 20 years. Respondents also mention (at 40) Powerex's natural-gas transactions, which make up "[l]ess than 5 percent" of Powerex's

Respondents also admit (at 41) that Powerex's governmentally assigned duties have expanded over the years to include treaty negotiation and performance on behalf of Canada and the Province, and subsidization of domestic industry. Respondents claim, however, that Powerex bears a burden to demonstrate the "magnitude" of those roles. They cite no authority for such a burden because none exists. *See S&S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 414 (2d Cir. 1983). Moreover, the record reflects that Powerex has played a substantial – and ongoing – role in shaping and executing Canada's and British Columbia's obligations to provide power to Seattle under international pacts. *See* Pet. Br. 11-12.[7]

Respondents also assert (at 38, 40) that the circumstances of Powerex's creation are irrelevant to the organ-status inquiry because in *Dole Food* the Court considered the entity's characteristics at the time the suit was filed. *See* 538 U.S. at 478. But, there, the Court was interpreting § 1603(b)(2)'s majority-ownership prong, which turns on an entity's current ownership structure. On the organ prong, when (as here) the entity's basic structure and functions have remained constant, it makes little sense to ignore relevant evidence of the entity's creation, as courts have recognized. *See Nippon*, 478 F.3d at 279; *Peninsula*, 476 F.3d at 143; *USX*, 345 F.3d at 209-11; *EIE Guam*, 322 F.3d at 640.[8]

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revenues, JA 249 (Peterson Dep.). Some of those purchases are "for the natural-gas plants in the BC Hydro system," C.A. E.R. (PWX) 0802 (Peterson Dep.), and thus directly benefit the Province.

[7] Contrary to respondents' suggestion (at 41 n.26), that role is relevant even though this suit did not arise out of those activities. The organ-status inquiry includes consideration of all relevant characteristics of the entity at issue. It is unlike the FSIA's commercial-activity exception, which explicitly directs the court to consider whether the suit is "based upon" the commercial activity. 28 U.S.C. § 1605(a)(2); *see Saudi Arabia v. Nelson*, 507 U.S. 349, 357-58 (1993) (interpreting § 1605(a)(2)).

[8] Moreover, contrary to respondents' claim (at 41-42), the creation of Powerex by a directive of the Province's Minister of Energy rather than

3. In addition, respondents claim (at 42-44) that the British Columbia government does not adequately supervise Powerex. Even if respondents' active-supervision requirement were consistent with the FSIA, Powerex meets that requirement, as respondents' principal authority shows. Unlike Japan, whose supervision the Fifth Circuit deemed "not active" in *Nippon*, British Columbia does not merely duplicate the oversight "of other governments' regulatory bodies." 478 F.3d at 279-80. Instead, provincially appointed BC Hydro directors make up a majority of Powerex's board and Powerex must comply with numerous statutes that do not apply to private-sector firms. *See* Pet. Br. 29-31; B.C. Br. 17-18. Respondents thus wrongly claim that "Powerex is regulated like other private energy companies." Resp. Br. 44. *See also Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004) (deeming the governmental supervision "active" simply because the government appointed the organ's president and directors, and "overs[aw]" "many of its operations").[9]

4. Respondents make much (at 44-45) of the fact that Powerex pays performance bonuses to its employees. Powerex pays those bonuses "to be competitive" with the

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a statute makes little difference because government instrumentalities are often created by administrative order. *See, e.g.*, Reorganization Plan No. 3 of 1970, § 1(a) ("[t]here is hereby established the Environmental Protection Agency"), *available at* http://www.epa.gov/history/org/origins/reorg.htm; *see also Lebron*, 513 U.S. at 388-91. In fact, Southwestern Power Administration, Southeastern Power Administration, and Alaska Power Administration all were created by Department of Interior Secretarial Orders. *See* United States Dep't of Energy, General Records of the Department of Energy § 434.3, http://www.archives.gov/research/guide-fed-records/groups/434.html.

[9] Respondents note (at 43-44) that the use of a risk-management committee is not unique to Powerex. But they fail to mention that, unlike a typical private-sector risk-management committee, Powerex's committee reports to British Columbia's Ministry of Finance. *See* Pet. Br. 29. Moreover, Powerex has that committee because, as a government body, it was required to be subject to one in order to transact in commodity derivatives. *See* Commodity Derivatives by Government Bodies Regulation, B.C. Reg. 407/2000 (Pet. Br. Add. 43); Pet. Br. 30.

private sector in hiring personnel, while retaining a compensation level for Powerex's traders that remains only "at the median of the Canadian market." JA 242 (Peterson Dep.). Many United States governmental entities similarly compensate employees above the government pay scale to compete with the private sector in hiring.[10] Moreover, unlike private firms, the compensation paid to Powerex's employees is publicly available – placing Powerex at a competitive disadvantage in retaining high-performing personnel. *See, e.g.*, BC Hydro, *Financial Information Act Return* at 85 (2006), *available at* http://www.bchydro.com/rx_files/policies/policies48313.pdf.

5. Finally, Powerex's relationship with BC Hydro is not inconsistent with its being an organ of the Province, as respondents claim (at 45-47). When the two company's financial statements are consolidated, transactions between them are eliminated. *See* JA 220 (Lambert Dep.) Moreover, accounting for those transactions enables the Province to identify inefficiencies as between Powerex and BC Hydro that would otherwise be obscured. *See* JA 201 (Minister of Energy testifying that ratepayers will not

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[10] *See, e.g.*, 5 U.S.C. § 4802(b) ("[t]he [Securities and Exchange] Commission may appoint and fix the compensation of such officers, attorneys, economists, examiners, and other employees as may be necessary for carrying out its functions under the securities laws"); Dave Flessner, *TVA Cuts Employee Bonuses*, Chattanooga Times (Free Press, TN), Dec. 16, 2006 (TVA president compensated $1.6 million for fiscal year; TVA nuclear chief compensated nearly $1.3 million; TVA paid $40 million in "year-end performance payments to . . . employees"; "TVA paid its 143 top executives another $10.5 million in bonuses"); Jacqueline Trescott & James V. Grimaldi, *Smithsonian's Small Quits in Wake of Inquiry*, Wash. Post, Mar. 27, 2007, at A1 (head of Smithsonian paid $884,733 in salary, plus bonuses, and a $1.15 million housing allowance over six years); FDIC, *Career Questions and Answers, General Employment Questions* ("The FDIC is a government corporation, and does not follow the pay scales on the General Schedule (GS). While we are part of the competitive civil service, our positions [are] paid on our own rate of pay[.]"). http://www.fdic.gov/about/jobs/jobs_questions.html.

subsidize export activity).[11] Although the Province considered other entities to market the power received from the United States under the Columbia River Treaty, the Province chose Powerex because of its "superior knowledge of the hydroelectric system in British Columbia and the Pacific Northwest" and its "mastery of all the details of the Treaty" – benefits that "outweigh[ed]" the "commercial advantages that the other competitors might have brought to the table." JA 231 (Peterson Dep.).[12]

II. SECTION 1447(d) DOES NOT APPLY HERE

The unusual circumstances of this case can be resolved under well-settled principles of appellate jurisdiction. Section 1447(d) applies only to cases remanded under 28 U.S.C. § 1447(c). *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976). The district court did not remand this case under § 1447(c) because, as it initially and correctly held (Pet. App. 20a), the entire action was "properly removed" under the federal-officer removal statute, 28 U.S.C. § 1442, and the FSIA's removal provision, *id.* § 1441(d). Those removal statutes conferred subject-matter jurisdiction on the district court over the entire case, which included the claims against Powerex, regardless of whether Powerex is independently entitled to remove under the FSIA. *See* Pet. Br. 41-42, 45-46. After the district court resolved the immunity defenses of the federal agencies and BC Hydro, it had the power to

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[11] While (as respondents note (at 47 n.30)) the British Columbia Utilities Commission has accepted Powerex's separate legal status, the Commission also concluded that "the actions of BC Hydro with respect to electricity trade are very important to the welfare of ratepayers." JA 277. Thus, the Commission forcefully underscored the key role Powerex plays in enabling BC Hydro to meet provincial objectives.

[12] Independently, respondents suggest (at 49) that this Court should not consider the FSIA's purpose of promoting harmonious foreign relations. Although courts need not bow to diplomatic pressure in resolving particular cases under the Act, *see Verlinden*, 461 U.S. at 488, the statute still must be interpreted in light of its purposes, *e.g.*, *McCreary County v. ACLU*, 545 U.S. 844, 861 (2005) ("[e]xamination of purpose is a staple of statutory interpretation").

decide the remaining claims against Powerex. *See id.* at 45-46; *cf. Osborn v. Haley*, 127 S. Ct. 881, 896 (2007).

Because the district court had (and never lost) statutory subject-matter jurisdiction over the claims against Powerex, its decision to remand those claims must be understood as a discretionary decision not to exercise supplemental jurisdiction conferred on it by § 1442 and § 1441(d). Section 1447(d) does not bar appellate review of such discretionary remand orders because they are not based on a lack of subject-matter jurisdiction under § 1447(c); rather, they are based on a district court's discretionary decision to decline to exercise its subject-matter jurisdiction. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 355 n.11 (1988); *Thermtron*, 423 U.S. at 346; Pet. Br. 45-46.

Respondents devote the bulk of their brief to presenting various claims that the court below lacked appellate jurisdiction. Those arguments fundamentally misunderstand principles of federal jurisdiction applicable in cases removed by federal agencies and foreign sovereigns.

A. The Immunity Of BPA, WAPA, And BC Hydro Did Not Require Remand Under § 1447(c)

Respondents contend (at 17-21) that the district court's remand order must have been issued under § 1447(c) because federal and foreign sovereign immunity, and the so-called "derivative-jurisdiction" doctrine, prevented the district court from acquiring subject-matter jurisdiction over this case when it was removed from state court. Lack of immunity is not a requirement for statutory subject-matter jurisdiction under either § 1442 or § 1441(d). Instead, Congress conferred subject-matter jurisdiction in those removal provisions based on the type of entity being sued – foreign sovereign or federal officer – and not the nature of the claim brought against it. The court's resolution of immunity does not divest the court of jurisdiction under either removal statute.

1. Respondents' contention exploits the familiar confusion surrounding the term "jurisdiction" – "a word of

many, too many, meanings." *Rockwell Int'l Corp. v. United States*, No. 05-1272, slip op. at 9 (U.S. Mar. 27, 2007) (internal quotation marks omitted). Under the usual application of § 1447(c), a district court will conclude that it lacks subject-matter jurisdiction over a removed action because it could not have exercised original jurisdiction over the action. *See* 28 U.S.C. § 1441(a). For example, a district court lacks jurisdiction when either the plaintiff's well-pleaded state-court complaint fails to present a federal question that confers jurisdiction under 28 U.S.C. § 1331, *e.g.*, *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983), or complete diversity is lacking at the time of removal, precluding jurisdiction under 28 U.S.C. § 1332, *see Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 564 (2005) (under § 1441(a), "absent complete diversity a case is not removable"). When the district court undertakes one of those "threshold inquir[ies]," *Osborn*, 127 S. Ct. at 895, and determines that the requirements of the removal statute have not been satisfied, § 1447(c) directs the district court to remand the case.

By contrast, the federal-officer and foreign-sovereign removal provisions entail a different threshold jurisdictional inquiry. If the removing defendant qualifies as a foreign state or as a federal officer or agency (with a colorable federal defense and acting under color of office, *see Jefferson County v. Acker*, 527 U.S. 423, 431 (1999)), then the requirements for removal are satisfied and the entire case is properly removed.[13] A district court's decision on

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[13] Respondents do not dispute that BPA, WAPA, and BC Hydro properly invoked § 1442(a) and § 1441(d) or that, when a federal agency or a foreign state properly removes an action to federal court, the entire case is removed. *See* Resp. Br. 25 n.12; Pet. App. 20a. Courts have so held under both § 1442, *see, e.g.*, *District of Columbia v. MSPB*, 762 F.2d 129, 132 (D.C. Cir. 1985) (per curiam); *Johnson v. Showers*, 747 F.2d 1228, 1229 (8th Cir. 1984); 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3727, at 168-69 & nn.74-75, Supp. at 105 n.74 (3d ed. 1998 & Supp. 2006) ("Wright & Miller") (citing cases from the Second, Fifth, Ninth, and Tenth Circuits), and § 1441(d), *see, e.g.*, *Davis v. McCourt*,

an immunity defense occurs only *after* the court obtains jurisdiction over the case under § 1442(a) or § 1441(d).

Although sovereign immunity has been described as "jurisdictional," *FDIC v. Meyer*, 510 U.S. 471, 475 (1994), nothing in the text of either § 1442 or § 1441(d) requires that the removing defendant lack immunity from suit as a precondition for statutory subject-matter jurisdiction to attach under those provisions. Unlike § 1441(a), neither provision requires that the case could have been brought originally in federal court. Rather, when a sovereign defendant removes under § 1442 or § 1441(d) and asserts immunity, the district court has subject-matter jurisdiction to resolve the entire case (although before proceeding on the claims against the removing defendant it must resolve the substantive question whether that defendant is immune from suit). That conclusion comports with this Court's cases recognizing that the resolution of an immunity defense requires the application of substantive federal law. *See Osborn*, 127 S. Ct. at 896; *Verlinden*, 461 U.S. at 493-94, 497.[14]

2. Respondents' theory, by contrast, requires the absurd conclusion that § 1447(c) mandates a district court to remand a suit against an immune sovereign to state court. That rule would defeat § 1442's and § 1441(d)'s purpose of permitting federal agencies and foreign sovereigns to have their immunity defenses adjudicated in a

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226 F.3d 506, 509-11 (6th Cir. 2000) (citing cases from four other circuits); *see also Norsyn, Inc. v. Desai*, 351 F.3d 825, 827 n.2 (8th Cir. 2003); *USX*, 345 F.3d at 197, 216.

[14] Respondents rely (at 19-20, 25) on a Ninth Circuit decision, *Security Pacific National Bank v. Derderian*, 872 F.2d 281 (9th Cir. 1989), that fundamentally misinterpreted the FSIA by holding that the requirements of the Act's original-jurisdiction provision, § 1330(a), must be met for the district court to have subject-matter jurisdiction under § 1441(d). *See* 872 F.2d at 283-84 & n.6. Unlike § 1330(a), § 1441(d) does not limit jurisdiction to claims "with respect to which the foreign state is not entitled to immunity." 28 U.S.C. § 1330(a). *Compare* Reply Br. Add. 1 (§ 1330) *with* Pet. Br. Add. 4 (§ 1441).

federal forum,[15] because the state court would be free to revisit and reject that defense on remand, *see Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145, 2157 (2006).

3. Nothing about the "discredited doctrine of derivative jurisdiction," 14C Wright & Miller § 3727, at 170, on which respondents rely (at 17-18), justifies the result they urge. Congress has eliminated the doctrine in cases removed under § 1441. *See* 28 U.S.C. § 1441(f). To the extent it retains validity in cases under § 1442, the upshot is that a district court should *dismiss* – not remand – a case removed from state court when the state court did not have jurisdiction to adjudicate it. *See Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 382-83 (1922), *superseded by statute*, 28 U.S.C. § 1441(f).[16]

4. Contrary to respondents' assertions (at 21, 24), sovereign immunity is unlike the jurisdictional issues that this Court faced in *Kircher* and *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977) (per curiam). Under the Securities Litigation Uniform Standards Act ("SLUSA") at issue in *Kircher*, a case is removable only if the Act precludes the suit from being brought at all. *See* 126 S. Ct. at 2155. Thus, SLUSA preclusion is a prerequisite for statutory subject-matter jurisdiction under SLUSA's removal provision. Whether SLUSA precludes a

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[15] *See Verlinden*, 461 U.S. at 489, 497; *Willingham v. Morgan*, 395 U.S. 402, 407 (1969); *see also Colorado v. Symes*, 286 U.S. 510, 517 (1932) (federal-officer removal statute is "to be liberally construed").

[16] *See also, e.g.*, 14B Wright & Miller § 3721, at 304 ("The effect of the [derivative-jurisdiction doctrine's] application was a dismissal of the action by the district court."). None of the cases cited by respondents even suggests that remand was appropriate. *See Kasi v. Angelone*, 300 F.3d 487, 503-04 (4th Cir. 2002) (describing a prior circuit decision in which the court affirmed a district court's entry of judgment on the merits in favor of the government in a case removed under § 1442); *In re Elko County Grand Jury*, 109 F.3d 554, 555 (9th Cir. 1997) (affirming district court's refusal to remand case removed under § 1442); *Edwards v. U.S. Dep't of Justice*, 43 F.3d 312, 314-17 (7th Cir. 1994) (affirming the district court's entry of judgment on the merits in favor of the government in a case removed under § 1442).

suit is thus analogous to whether a particular defendant is a federal agency under § 1442(a)(1) – they are both requirements for removal. The validity of a federal defense of sovereign immunity, by contrast, is a substantive question that the court addresses *after* determining that the requisites of the removal statute have been satisfied.

Nor does *Gravitt* help respondents. There, the basis for removal was diversity of citizenship. The district court remanded the case as "improperly removed," after concluding that, at the time of removal, the parties were not completely diverse. 430 U.S. at 723. Thus, like *Kircher*, *Gravitt* remanded on the ground that the requisites of the removal statute were not met at the time of removal.

B. The District Court Never Lost Jurisdiction Over The Claims Against Powerex

Respondents suggest (at 26 n.13) that the district court lost jurisdiction over the claims against Powerex after concluding that the federal agencies and BC Hydro were immune from suit. The D.C. Circuit has correctly rejected that assertion, holding that a district court does not lose jurisdiction over claims against non-sovereign defendants simply because a removing federal agency has been dismissed as immune. *See MSPB*, 762 F.2d at 131-33.[17]

Respondents' principal justification for their contention – a citation to *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1242 (2006) – does not support them. This Court stated in *Arbaugh* that, when a federal court dismisses a federal claim for lack of subject-matter jurisdiction, it cannot

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[17] Other courts also have recognized that principle under both § 1442 and § 1441(d). *See IMFC Prof'l Servs. of Fla., Inc. v. Latin Am. Home Health, Inc.*, 676 F.2d 152, 156, 158-59 (5th Cir. Unit B 1982) (§ 1442); 14C Wright & Miller § 3727, at 166-68, 171 (same); *In re Surinam Airways Holding Co.*, 974 F.2d 1255, 1258-60 (11th Cir. 1992) (§ 1441(d)); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1375-78 & n.6 (5th Cir. 1980) (same); 14C Wright & Miller § 3729.1, at 239-43 (same); *cf.* 28 U.S.C. § 1367. *But cf. Schlumberger Indus., Inc. v. National Sur. Corp.*, 36 F.3d 1274, 1284-85 (4th Cir. 1994) (case must be remanded when plaintiff voluntarily dismisses foreign sovereign immediately after removal).

exercise supplemental jurisdiction under 28 U.S.C. § 1367. *Id.* at 1244-45. But the Court made that statement while analyzing whether a complaint stated a federal claim that gave rise to jurisdiction under § 1331. The Court did not purport to address cases such as this one in which a court possesses and exercises jurisdiction under § 1442 or § 1441(d) and concludes that the removing defendant is immune from suit. *Cf. Rosado v. Wyman*, 397 U.S. 397, 402-05 (1970) (mootness of main claim does not destroy power to decide supplemental claim).

Furthermore, even if the district court lost jurisdiction over the claims against Powerex once it resolved the immunity defenses of the federal agencies and BC Hydro (and assuming that Powerex is not an organ of British Columbia), the district court's remand order would not have been authorized under § 1447(c) because that provision authorizes remand only when the district court lacks subject-matter jurisdiction *at the time of removal*. *See* Pet. Br. 42-45; U.S. Br. 8-11.[18] Respondents briefly dispute that point in a footnote (at 27 n.15), but they ignore the structure and history of § 1447(c) and this Court's recognition that subject-matter jurisdiction is determined when the federal court's jurisdiction is invoked.

C. Section 1447(d) Does Not Apply To Discretionary Remands Of Supplemental Claims

Respondents' claim (at 31-33) that this Court should apply § 1447(d) to orders remanding claims within the court's supplemental jurisdiction – such as in this case and *Cohill* – is inconsistent with this Court's cases and unsupported by the policy of § 1447(d).

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[18] Respondents apparently believe that petitioner and the United States should have cited *Adkins v. Illinois Central Railroad Co.*, 326 F.3d 828 (7th Cir. 2003), *cited in* 16 James Wm. Moore et al., *Moore's Federal Practice* ¶ 107.44[2][a][iii] (3d ed. 2006). *See* Resp. Br. 26-27 & n.14. But that case did not hold that post-removal events can trigger a lack of jurisdiction within the meaning of § 1447(c); it held that "[t]he present case, in our view, is best regarded as one in which the court never had any jurisdiction over the claim." *Adkins*, 326 F.3d at 833.

Respondents cannot dispute that *Thermtron* held that "only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d)." 423 U.S. at 346. Nor can they dispute that *Cohill* held that § 1447(c) "do[es] not apply" to discretionary decisions to remand rather than to exercise supplemental jurisdiction. 484 U.S. at 355 n.11. Indeed, to hold that § 1447(d) applies here, the Court essentially would have to overrule *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1976), which held that § 1447(d) was "inapplicable" to a discretionary "abstention-based remand order" because it "does not fall into either category of remand order described in § 1447(c)." *Id.* at 712.[19] Although respondents assert (at 31) that "a remand of a supplemental claim is the legal equivalent of a section 1447(c) remand," the language of § 1447(c) provides no support for that assertion.[20] When the federal court *has* jurisdiction – as in the *Cohill* and abstention contexts – a remand is not *mandatory* under § 1447(c) and must therefore be discretionary. *Cf. Rockwell*, slip op. at 10 n.6.

Perhaps recognizing that the type of discretionary remand order at issue here is reviewable under settled law, respondents' *amici* urge this Court to overrule *Thermtron* – a decision the Court has reaffirmed no less than four times, most recently this Term. *See Osborn*, 127 S. Ct. at 893, 895; *Kircher*, 126 S. Ct. at 2153; *Quackenbush*, 517 U.S. at 711-12; *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995). Notably, respondents do not join that argument. *See* Resp. Br. 32. For that reason alone,

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[19] Although, as respondents note, no party urged the application of § 1447(d) in *Quackenbush*, this Court analyzed and resolved that issue, *see* 517 U.S. at 711-12, presumably to satisfy its obligation to ensure its own jurisdiction, *see, e.g., Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 593 (2004).

[20] In claiming that § 1447(c) covers all remands, *see* Public Citizen Br. 7-8, respondents' *amici* read the word "defect" out of the statute by applying § 1447(c) to all remand orders, even where (as here) there was no defect in removal. *See, e.g., Autoridad de Energia Electrica de Puerto Rico v. Ericsson Inc.*, 201 F.3d 15, 17 (1st Cir. 2000).

this Court should decline to accept *amici*'s invitation to reexamine its 30-year-old decision in *Thermtron*.[21]

Additionally, the Court should reject *amici*'s call to reexamine *Thermtron*'s settled construction of § 1447(c) and (d) because of the "special force" that *stare decisis* has in matters of statutory interpretation. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (internal quotation marks omitted).[22] *Thermtron* held that § 1447(c) and (d) "must be construed together." 423 U.S. at 345. That rule has its roots in cases decided more than 60 years ago.[23] Although Congress has twice amended § 1447(c) since *Thermtron*, *see* Pet. Br. 43-44 & n.52, it has taken no action to alter the rule set forth in that decision. Thus, "Congress has had [more than] 30 years in which it could have corrected [the Court's] decision in [*Thermtron*] if it disagreed with it, and has not chosen to do so." *Hilton*, 502 U.S. at 202.

Permitting appellate review of *Cohill* remand orders does not conflict with the policy underlying § 1447(d). Congress intended that provision to prevent "prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *United States v. Rice*, 327 U.S. 742, 751 (1946). When, as here, the district court has subject-matter jurisdiction under two different removal statutes, the concern articulated in *Rice* is not present because the district court's "jurisdiction" is not in "ques-

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[21] *See, e.g., Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991) ("we do not ordinarily address issues raised only by *amici*"); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981).

[22] *See, e.g., Shepard v. United States*, 544 U.S. 13, 23 (2005); *Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 78 n.10 (1999); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977); *Flood v. Kuhn*, 407 U.S. 258, 282-84 (1972).

[23] *See Kloeb v. Armour & Co.*, 311 U.S. 199, 202 (1940) (the predecessors of § 1447(c) and (d) "'are in pari materia, [and] are to be construed accordingly rather than as distinct enactments'") (quoting *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 380 (1937)).

tion[]." *Id.* Here, appellate review ensures that the district court's decision not to exercise supplemental jurisdiction comports with the "strict duty to exercise the jurisdiction that is conferred upon [federal courts] by Congress." *Quackenbush*, 517 U.S. at 716. That is particularly true in this case because the federal-officer and foreign-sovereign removal statutes embody a strong congressional preference for a federal forum. *See supra* note 15.

D. The District Court Did Not Clearly Purport To Remand For Lack Of Subject-Matter Jurisdiction Under § 1447(c)

Finally, respondents claim that, regardless of whether the district court in fact had jurisdiction here, § 1447(d) bars appellate review because the district court "purported" to remand for lack of subject-matter jurisdiction. Although respondents spend three pages dissecting the remand order (at 12-15), they fail to identify either a statement by the district court that it was remanding because it lacked subject-matter jurisdiction or a citation to § 1447(c). The remand order contains no clear explanation of why the district court felt compelled to remand *the entire case* – which it had held was "properly removed," Pet. App. 20a – after concluding that the federal agencies and BC Hydro were immune from suit and that Powerex was not an organ of British Columbia.[24] At most, respondents have established that the order is ambiguous. But, even if the district court had purported to remand for lack of subject-matter jurisdiction, it would still be necessary to inquire further to determine whether the remand order

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[24] *Compare Kircher*, 126 S. Ct. at 2158 (Scalia, J., concurring in part and in the judgment) ("'Because the Court lacks subject matter jurisdiction, the Court **REMANDS** this action[.]'") (quoting district court order); *id.* at 2153 (majority) ("The District Court said that it was remanding for lack of jurisdiction[.]"). Although respondents rely heavily on the district court's after-the-fact characterizations of its remand order, they fail to explain how a district court can purport to remand a case under § 1447(c) by citing that provision only in orders issued *more than a month after the remand order*.

was based on the resolution of an issue of "subject matter jurisdiction" within the meaning of § 1447(c). The Court undertook precisely that kind of analysis in *Kircher*. *See* 126 S. Ct. at 2154-55; Pet. Br. 47.[25]

Respondents and their *amici* also observe that the remand order does not contain a balancing of the discretionary factors set forth in *Cohill*. But, because *Cohill* did not authorize district courts to remand supplemental claims without making "a proper determination that retaining jurisdiction over the case would be inappropriate," 484 U.S. at 357, the district court's failure to conduct the proper *Cohill* analysis before remanding makes this case like *Osborn*, *Quackenbush*, and *Thermtron*, where this Court reviewed and reversed unauthorized remand orders. The failure to conduct a balancing does not make this case anything like *Gravitt*, where the district court remanded the case as "improperly removed" after determining that complete diversity was lacking at the time of removal – a remand order that was "*plainly* within the bounds of § 1447(c)." 430 U.S. at 723 (emphasis added).[26]

CONCLUSION

The judgment should be reversed insofar as it held that Powerex is not an organ of British Columbia.

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[25] Respondents seize on a sentence in a footnote in *Kircher* that observed that the district court in that case had understood itself to be making a jurisdictional ruling. *See* 126 S. Ct. at 2155 n.12. But the bulk of that footnote was devoted to bolstering the Court's conclusion that SLUSA remands are in fact remands for lack of subject-matter jurisdiction under § 1447(c). *See id.* The Court did not hold that the district court's characterization of the issue as jurisdictional was dispositive. *See id.* at 2154 (evaluating whether "the District Court *was correct* in understanding its remand order to be dictated by its finding that it lacked removal jurisdiction") (emphasis added).

[26] In any event, § 1447(d) does not apply here for the independent reason that Congress did not intend for that provision to foreclose appellate review of erroneous decisions denying a foreign governmental entity's rights under the FSIA. *See* Pet. Br. 48-50; B.C. Br. 22-27; *see also* U.S. Br. 15 n.6. The Court need not reach that broader theory of appellate jurisdiction to resolve the applicability of § 1447(d) to this case because § 1447(d) is inapplicable under well-settled principles.

Respectfully submitted,

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April 6, 2007

ADDENDUM

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STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1330. **Actions against foreign states**

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.